NO. 21529

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ILDIKO NAGY,

Appellant,

vs.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

APPELLANT'S BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

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APPELLANT'S BRIEF

Appellant, a twenty-one year old single female, is a native and citizen of Hungary. That on December 1, 1964 she entered the United States at New York, New York as a non-immigrant visitor and was authorized to remain in the United States until September 15, 1965. On November 26, 1965 appellant was granted the privilege of a voluntary departure in lieu of the institution of deportation proceedings, such departure to be effective on or before December 6, 1965. Appellant did not depart from the United States, pursuant to an Order to Show Cause and Notice of Hearing dated February 9, 1966 which hearing was scheduled on February 17, 1966.

At said Order to Show Cause hearing and its several continuances, the appellant made an application for adjustment of her status to that of a permanent resident pursuant to Section 245 of the Immigration and Nationality Act (8 U. S. C. 1255) and requested temporary withholding of her deportation pursuant to Section 243(h) of the Immigration and Nationality Act.

The hearings on this matter proceeded to several continued dates, Reese B. Robertson, Esq. appearing for the Service and the respondent, now appellant, appearing in pro per. On July 15, 1966 a special inquiry officer, Louis L. Mattel denied appellant's requests for adjustment of status pursuant to Section 245 and denied the withholding of deportation under Section 243(h) of the Act. Said special inquiry officer further ordered that in lieu of an order of deportation, the respondent-appellant be granted voluntary departure without expense to the government. Thereafter, on July 22, 1966 appellant, through counsel, filed a Notice of Appeal to the Board of Immigration Appeals. Said appeal was denied by decision of the Chairman of the U. S. Department of Justice, Board of Immigration Appeals and was served upon appellant on or about November 30, 1966. This appeal is from the decision of the United States Department of Justice, Board of Immigration Appeals.

QUESTIONS FOR THE COURT

1. Did the appellant produce sufficient facts to invoke stay of deportation under Section 243(h) of the Immigration and

Nationality Act.

2. Was appellant entitled to adjustment of status to permanent resident under Section 245 of the Immigration and Nationality Act.

3. Was appellant denied due process in the hearing before the special inquiry officer.

I

REGARDING THE STAY OF DEPORTATION UNDER SECTION 243(h) OF THE IMMIGRATION AND NATIONALITY ACT.

Section 243(h) of the Immigration and Nationality Act since 1965 provides that the Attorney General is authorized to withhold deportation of an alien if such alien would be subject to persecution on account of (a) race, (b) religion, (c) political opinion. The case of Dunat v. Hurney, 297 F. 2d 744 (3rd Cir. 1961) added one further element, that is, the complete withdrawal of all economic opportunity as being tantamount to persecution under Section 243(h). It is contended herein that appellant would be persecuted on account of her political activity, her religious practice and by the imposition of extreme economic hardship.

On Page 5 of the Decision of the United States Department of Justice, Board of Immigration Appeals, it contends that appellant is "politically unimportant person". Further, it is concluded that appellant took no part in political activity either in Hungary or in the United States. The transcript of the hearing before the special

inquiry officer contains numerous references to her active disobedience, in that, the appellant has refused during her employment to join any political activist group. Appellant testified [Transcript, p. 12, lines 5-7] that even in high school she refused to join a Communist youth group called "Kis". As a person who just entered the labor market in Hungary, the Transcript [p. 15, lines 19-22] further indicates appellant's refusal to join any organization which had a political motivation. Appellant stated that at her place of employment "they wanted to force me to join the young people's Communistic organization in this factory, but I didn't want to join them". Further, appellant testified that the communist party leader was aggravated at appellant and did in fact make attempts to block her departure from Hungary [Transcript, p. 18, lines 1-5] although said efforts failed due to time limitation. It was further emphasized that Mr. Valko, an apparent leader of a Communist organization, was personally involved with the appellant, in that said person intimidated the mother of the appellant. Appellant unequivocally testified that her political ideas, to wit: her love for the United States was expressed to her supervisor and that she was quite vocal for her praise of the United States [Transcript, p. 21, lines 20-23; p. 20, lines 5-7].

It must be noted that appellant, at the time of her departure from Hungary was merely 19 years of age and had just entered the labor market in Hungary. It would be totally unreasonable to expect greater political involvement on a person of such tender age. Nonetheless, it is evident from the aforesaid, that appellant did, in a

negative manner, make evident her displeasure at Communist activities, organizations and her employment, which was dominated by politically activated people.

There is ample evidence to sustain appellant's position that she would be persecuted on her return to Hungary on account of her religion. Admittedly, the majority of Hungarian people are of Roman Catholic faith, but, it was not established as to the proportion of such peoples who actively participate in their faith. Appellant testified [Transcript, p. 14, lines 7-18] that she would, in fact, be persecuted, not because she is of the Roman Catholic faith, but because she actively practiced such faith. Further, it was brought before the special inquiry officer that the Communist political and pseudo-political officials paid special attention to those people who practice their religion and that such persecution is usually manifested by the inability of such person to receive a job commensurate with their training and/or ability. It was brought out [Transcript, p. 14, lines 14-18] that the appellant received a "lower position" and that despite her high school and one year of college chemistry training, she was required to work as a bottle washer.

The Dunat case (see above) indicated that there must be a complete withdrawal of all economic opportunity in order that it be tantamount to persecution under Section 243(h) of the Immigration and Nationality Act. Further, it is conceded that mere economic disadvantages are not considered persecution under the cases and the laws prior to the present adoption of Section 243 in 1965. It is respectfully submitted that all of the cases requiring complete

withdrawal were decided at the time Section 243(h) required "physical persecution". Since 1965 the requirement of physical persecution has been eliminated. The appellant would not be deprived of all economic opportunity, but, as it is clear by the evidence presented, she would be compelled to do only menial jobs and under the present status of this Section, it is submitted that same would be persecution.

It must be recognized by the Honorable Court that the appellant was without representation at all stages of the hearings. That evidence of greater weight could have been submitted by the appellant were it not for her total lack of understanding of the evidence requested of her, her tender age, and her lack of funds to employ counsel. For these reasons, the Transcript of the hearing must be taken most favorably to appellant and it must be recognized by the Honorable Court that the Service did not bring forth any evidence to the controvention of the facts elicited by the appellant. In Sovich v. Esperdy, 319 F. 2d 291 (2nd Cir. 1963) which was decided prior to the present wording of Section 243(h) is also relevant herein. The letter from the Department of State (Exhibit 4) clearly points out that under the Hungarian law, the appellant is in violation thereof for failing to return to said Country and that the penalties are very severe. The severity noted in said Exhibit together with the apparent animosity of her supervisor, Mr. Valko, and her refusal to join any Communist organization will certainly be determinative of her penalty. The Sovich case states, in part, as follows:

"We are unwilling to believe, however, that Congress has precluded from relief under Section 243(h), to an alien threatened with long years of imprisonment, perhaps even life imprisonment, for attempting to escape a cruel dictatorship. Such a construction of the statute would attribute to Congress, an insensitivity to human suffering wholely inconsistent with our national history. We hold, therefore, that the Attorney General, through his delegate, erroneously construed the limits of his discretion in ruling that imprisonment for illegal departure may never constitute "physical persecution" within the purvue of Section 243(h)."

In said case, as in the case at bar, the severity of the penalty coupled with the persecutions on account of political activity, religious practice and employment discrimination would certainly be sufficient to invoke a stay of deportation under Section 243(h).

II

REGARDING THE ADJUSTMENT OF STATUS UNDER SECTION 245 OF THE IMMIGRATION AND NATIONALITY ACT.

In order for appellant to be elligible for the benefits of Section 245 of the Immigration and Nationality Act, the appellant is required to establish that a visa is readily available to appellant and under provisions of 8 C. F. R. 245. 1, the appellant must present a certification issued by the Secretary of Labor under Section 212(a)

(14) of the Act. The decision of the special inquiry officer dated July 15, 1966 and specifically page 3 thereof, indicates that the visa office of the department of State for the month of July discloses that the quota for Hungary is open in all preferences and non-preference categories and thus, that portion of the appellant's requirement has been met. Evidence at the continued hearing held on July 15, 1966 indicated that on July 11, 1966 (four days prior to said hearing) appellant received a license as a cosmetologist from the State of California [Transcript p. 33, lines 14-16]. It was evident that the receipt of the license from the State of California was a condition precedent to the receipt of a clearance by the Department of Employment. It is respectfully submitted that the special inquiry officer should have continued the hearing for approximately thirty days enabling the appellant to obtain such clearance. Were it not for the lack of continuance, the appellant would have received such labor clearance and would have met all of the requirements of Section 245 of the Immigration and Nationality Act.

III

REGARDING THE DENIAL OF DUE PROCESS OF LAW TO APPELLANT.

The Courts have consistently held that an alien in deportation proceedings is entitled to due process. See Sunjka v. Esperdy (D. C. N. Y. 1960), 182 F. Supp. 280; Blazina v. Bovehard (C. A. N. J. 1961), 286 F. 2d 507.

At all of the hearings, appellant was informed by the special inquiry officer as to her right to representation by an attorney at "no cost to the United States Government" [Transcript, p. 1, lines 10-12]. The appellant, due to her age and her lack of funds, proceeded without an attorney through an interpreter.

It is respectfully submitted, that the appellant, then, a 21 year old single female, unversed in the processes of law, the procedural aspects to be taken and the gravity of the proceedings, should have been afforded legal counsel at the expense of the Government. Although deportation proceedings are civil in nature, the possibility of incarceration during deportation proceedings and the penalty of deportation makes the deportation procedures quasi criminal in fact. It is respectfully submitted that the most recent cases, to wit: the Dorado, Escobedo and Miranda clearly reveal the Supreme Court's thinking in that, the right of representation by a criminal defendant has been made explicit. An alien, such as the appellant herein, being faced with the return to a hostile environment and the substantial probability of long imprisonment makes these decisions applicable to the proceedings herein.

The importance of legal representation for no other purpose but to request a continuance for appellant at the time that appellant received her license as a cosmetologist by the State of California, clearly indicates the importance of such representation.

IV

CONCLUSION

Appellant has demonstrated and the facts attest to same, that the appellant would be persecuted and that an adjustment of status would have been granted were appellant advised of the continuance that she undoubtedly would have received were she asked for same. Appellant requests that the Honorable District Court reverse the decision of the United States Department of Justice, Board of Immigration Appeals and to withhold the deportation of the appellant under Section 243(h), or in lieu thereof, or in addition thereto, give appellant an opportunity to adjust her status to that of a permanent resident under Section 245(h).

Respectfully submitted,

MAZIROW & SCHNEIDER

By: THOMAS SCHNEIDER

Attorneys for Appellant,
Ildiko Nagy.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Thomas Schneider

THOMAS SCHNEIDER